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IN THE

Supreme Court of the United States

October Term, 1954
No. 455

WALTER L. IRVIN,

Petitioner,

v.

L. F. CHAPMAN, Superintendent of Raiford State Penitentiary, Raiford, Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above-entitled case on November 5, 1954.

Citations to Opinions Below

The opinion of the Supreme Court of Florida is unreported and is printed in the Appendix hereto, pages 14-17.

Jurisdiction

The judgment of the Supreme Court of Florida, denying an original petition herein for writ of habeas corpus, was entered on November 5, 1954 (Appendix, p. 14). The

court below simultaneously denied an alternative petition for a stay of execution pending application for a writ of certiorari to this Court (Appendix, p. 17). Petitioner, on November 5, 1954, applied to this Court for a stay of execution pending the filing and disposition of a petition for writ of certiorari. On November 6, 1954, this Court entered an order staying petitioner's execution pending the filing and disposition of a petition for certiorari to review the judgment of the court below, provided said petition is filed on or before November 20, 1954.

Question Presented

Whether, upon original petition for habeas corpus in the Supreme Court of Florida—alleging that petitioner's conviction and death sentence for rape are based upon a trial, conducted in an atmosphere of public and official hostility, in which the state used perjured and fabricated evidence and suppressed other evidence material to petitioner's defense, which allegations are not controverted by the state—the court below erred in denying the petition upon the grounds (1) that its previous affirmance of the conviction upon appeal forecloses further adjudication of the issues raised and (2) the petition raises no federal question.

Statement of the Case [1]

Petitioner and a co-defendant, Samuel Shepherd, were convicted of the crime of rape and sentenced to death in

[1] The transcript of record herein, pursuant to Rule 21, paragraph 1, consists of the Petition for a Writ of Habeas Corpus and Exhibit A attached thereto; the Alternative Petition for Stay of Execution; and the Opinion of the Supreme Court of Florida. The Petition and the Opinion are reprinted in the Appendix hereto, *infra*, pp. 1 and 14.

the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Lake County, on September 8, 1949. The Supreme Court of Florida unanimously affirmed. *Shepherd* v. *State,* 46 So. 2d 880. This Court, in a per curiam opinion, unanimously reversed. *Shepherd* v. *Florida,* 341 U. S. 50.[2]

Petitioner and his co-defendant again were indicted for rape on July 6, 1951, and, after the co-defendant was killed and petitioner seriously wounded under circumstances set forth in petitioner's affidavit attached to his Petition for Habeas Corpus herein (Appendix, pp. 12-13), petitioner was tried in the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Marion County, before a jury which returned a verdict of guilty, without recommendation of mercy, on February 14, 1952. On the same day the court sentenced petitioner to die by electrocution. A motion for new trial was denied on March 11, 1952. On appeal, the Supreme Court of Florida affirmed the conviction on June 23, 1953. *Irvin* v. *State,* 66 So. 2d 288. This Court denied a petition for certiorari on January 4, 1954. *Irvin* v. *Florida,* 346 U. S. 927, reh. den. 347 U. S. 914.

By an original action in the Supreme Court of Florida petitioner sought a writ of habeas corpus against the superintendent of the state prison, his custodian, alleging that his detention and restraint were unlawful in that the judgment and sentence under pretext of which petitioner was being held were "illegal and void as contrary to the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of life [or liberty] without due process of law" (Appendix, pp. 1-2).

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[2] The late Mr. Justice Jackson, concurring in the result, in an opinion in which Mr. Justice Frankfurter joined, stated that "The case [in consideration of the conditions under which the trial took place and accompanying events] presents one of the best examples of one of the worst menaces to American justice." 341 U. S. 50, 55.

The original petition for habeas corpus in the court below recited the proceedings and events since his arrest, and alleged in support of his contention that his conviction and sentence were "illegal, void and in violation of the Fourteenth Amendment of the United States Constitution . . .", the following reasons: (1) that his trial was conducted in an atmosphere of severe hostility and the refusal of the trial court to grant petitioner's motion for a change of venue denied him the possibility of a fair trial (Appendix, p. 4); (2) that the trial court's refusal to allow petitioner to introduce, at the hearing on his motion for change of venue, evidence of the results of a public opinion survey made by the Elmo Roper Agency precluded petitioner from introducing substantial proof of the extent of the hostility pervading Marion County and the impossibility of petitioner's obtaining a fair trial therein (Appendix, p. 6); (3) that petitioner was convicted by the use of evidence obtained by an unlawful search and seizure (Appendix, p. 7); (4) that petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials (Appendix, p. 7); and (5) that the totality of errors committed at petitioner's trial including: (a) acts of prejudicial misconduct on the part of the prosecutor, such as invidious references to petitioner's race (Appendix, pp. 7-8); erroneous, prejudicial and highly unfair assertions about defense counsel (Appendix, p. 8); assertion of the prosecutor's personal belief in petitioner's guilt and references to his [the prosecutor's] ill health (Appendix, p. 8); (b) the State's constructive suppression of evidence by refusing to obtain accurate scientific analysis, available to the State, of raw physical evidence which was found (Appendix, pp. 8-9). The petition further alleged that the sheriff's deliberate killing of petitioner's co-defendant, Shepherd, resulted in the suppression of evidence which Shepherd could have given on behalf of petitioner and which would have proved petitioner's innocence of the crime with which he was charged (Appendix, p. 9);

and that the state constructively suppressed evidence by refusing to have the medical doctor who had examined the alleged rape victim early the same morning the alleged rape was supposed to have occurred, testify for the reason that said doctor, upon the basis of petitioner's information and belief, would have testified that the prosecutrix had not been raped (Appendix, pp. 9-10).

The respondent filed no pleading in the court below, and that court, upon examination of the petition unanimously denied the petition upon the grounds (1) that, "with the exception of certain matters hereinafter noted, the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause * * * Therefore, such matter is not now open for adjudication" (Appendix, pp. 14-15); (2) that, having failed to offer in evidence at petitioner's second trial the transcribed testimony by Shepherd at the first trial, as provided under Section 920.09, Florida Statutes 1951, "petitioner is foreclosed from now raising the question as to what testimony Shepherd might have given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner" (Appendix, p. 16); and (3) the petition showing only that "petitioner believes that if the doctor had been called he might have given testimony favorable to his cause * * * it is entirely immaterial that the state did not call the medical doctor as a witness, because the defendant, petitioner in this proceeding, was free to do so. Furthermore * * * [the petitioner having asserted no reason for] his failure to raise on the prior appeal the ground now asserted for the first time in his petition for habeas corpus * * * it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof" (Appendix, pp. 16-17).

In denying petitioner's alternative application for a stay of execution to enable petitioner to seek a review of

its judgment by certiorari, the court below said: "We find no federal question involved in this controversy, and consequently the application for stay should be denied" (Appendix, p. 17).

Reasons for Allowance of the Writ

The respondent filed no pleading in response to the petition for writ of habeas corpus in the court below. Thus, the allegations of the petition stand uncontroverted. The Supreme Court of Florida appears to have treated the matter as if on motion to dismiss or demurrer. Consequently, the allegations of the petition must be accepted as true. *Moore* v. *Dempsey,* 261 U. S. 86, 87.

I

The allegations in a petition for writ of habeas corpus of the prosecution's knowing use of fabricated evidence and perjured testimony, not controverted by respondent, require granting of the writ. The decision of the Supreme Court of Florida below to the contrary is probably not in accord with the applicable decisions of this Court.

Petitioner alleged in the court below that his conviction was based upon evidence which was patently false and knowingly contrived by state officials (Appendix, p. 7). These allegations were not controverted in the court below.

The footprint casts made by Deputy Sheriff Yates were alleged to be patently false because, among other things, it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of this testimony were convex, and thus neces-

sarily false and contrived. By knowingly using such evidence petitioner alleged that the state deprived him of a fair trial and thus denied him due process of law (Appendix, p. 7).

Knowing use by the prosecutor of perjured testimony in a state criminal prosecution was first held to violate that due process of law required by the 14th Amendment in *Mooney* v. *Holohan,* 294 U. S. 103. There the court said:[1]

> That requirement [of due process] . . . cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as the obtaining of a like result by intimidation.

This Court has often reaffirmed this proposition. *Pyle* v. *Kansas,* 317 U. S. 213, 215-216; *White* v. *Ragen,* 324 U. S. 760, 764; see also *Hysler* v. *Florida,* 314 U. S. 411, 413.

In *Pyle* v. *Kansas, supra,* the specific allegations of knowing use of perjured testimony were contained in exhibits that were not sworn to. This Court, pointing out that the allegations were "nowhere . . . refuted or denied . . .",[2] remanded the case for hearing. In *James* v. *U. S.,* 175 F. 2d 769, it was held that mere allegations of the knowing use of perjured testimony entitled a person to a hearing. In the instant case, the pertinent allegations were contained in the sworn petition for writ of habeas

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[1] 294 U. S. 103, 112.

[2] 317 U. S. 213, 216.

corpus in the court below and, as previously indicated, they were not controverted by the respondent. The court below, apparently relying upon the fact that this issue was raised upon the trial of petitioner and apparently was submitted to the trial jury and resolved by its general verdict of guilty, contended that its affirmance of that verdict precluded further adjudication of the issue upon the petition below.

In *Hysler* v. *Florida, supra,* this Court stated that a petition charging knowing use of perjured testimony might be denied by a state court pursuant to its rule of law requiring that it must look at the reasonableness of the allegations, the possibility of their truth, and their substantiality. Accordingly, this Court found in the *Hysler* case that there was "no doubt that the finding of insubstantiality was justified."[3] However, the opinion below in the instant case does not indicate that the court reviewed the evidence or concluded that the uncontroverted allegations in the petition for habeas corpus were insubstantial or beyond belief. As previously noted these allegations were sworn to and in light of their physical basis obviously were substantial.

The dissenting justices in the *Hysler* case noted that:

> It must also be borne in mind that if the proof accompanying the petition for leave to apply for a writ of error *coram nobis* had to be so full as to establish conclusively the truth of the allegations, petitioners who required the amplifying or corroborative evidence of inaccessible or unwilling witnesses would be effectively barred from access to this remedy, for they would never have the opportunity to utilize the compulsory process which a trial of the facts would afford.[4]

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[3] 315 U. S. 411, 422.

[4] 315 U. S. 411, 426.

In the instant case, the evidence necessary to support petitioner's allegations, obviously would not be available except upon a hearing of the facts by the court below. Having denied petitioner the opportunity to compel the production of such evidence in the court below, the court below would be unable to ascertain by a mere review of the conviction in the trial court, the weight and sufficiency accorded such evidence before the jury, and it is submitted that such review cannot foreclose the petitioner's right to have this issue adjudicated upon his petition for habeas corpus.

II.

The allegations of a petition for writ of habeas corpus that in a state criminal prosecution evidence beneficial to defendant was suppressed, require the granting of the writ. This question has not previously been decided by this Court.

The uncontroverted allegations of the petition below set forth (a) that the State engaged in a constructive suppression of evidence by refusing to obtain and introduce available scientific analysis of pertinent raw physical evidence [*e.g.*, a smear upon petitioner's trousers, impliedly semen; "lint" found near the scene of the alleged crime which, according to testimony, was similar to that found in co-defendant Shepherd's automobile; plaster casts of tire tracks] (Appendix, pp. 8-9); (b) that the State engaged in constructive suppression of evidence by refusing to have the medical doctor testify who had examined the prosecutrix early the same morning the alleged rape was supposed to have occurred, and petitioner, based upon information and belief, believes that the state suppressed the testimony of the medical doctor because said medical doctor would have testified that the prosecutrix had not been raped (Appendix, pp. 9-10); and (c) that Sheriff McCall's

deliberate killing of co-defendant Samuel Shepherd resulted in the suppression of evidence which Shepherd could have given on behalf of the petitioner and which would have proved petitioner's innocence of the crime with which he was charged (Appendix, p. 9).

The court below ignored, in its opinion, the allegation concerning constructive suppression of scientific analysis pertaining to the physical evidence. It disposed of the allegations with reference to suppression of the doctor's testimony by shifting the responsibility to the petitioner (Appendix, pp. 16-17).

As to the constructive suppression of evidence in the form of testimony which petitioner expected to offer by Samuel Shepherd, who was killed by the Sheriff before trial, the court below says:

> As to this point, the records of this Court, of which we take judicial notice, show that at the first trial of this cause the co-defendant Shepherd was sworn and testified in full detail as to the activities in which he and the petitioner were engaged. Sec. 920.09, Florida Statutes 1951, provides that when a new trial is granted in a criminal case such new trial shall proceed in all respects as if no former trial had been had; except that if witnesses used on the first trial are dead at the time of the second trial "The evidence of such witnesses on former trial may be presented as the same was taken by the court reporter."
>
> The records of this Court show also that on the second trial of this cause in the court below, no effort was ever made by the petitioner to introduce into evidence a transcribed copy of the evidence given at the former trial by the decedent Shepherd. Having failed to introduce this evidence at the second trial, the petitioner is foreclosed from now raising the question as to what testimony Shepherd might have

given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner. State ex rel. Johnson v. Mayo (Fla.), 69 So. 2d 307, certiorari denied 347 U. S. 992, 98 L. Ed. 722, 74 S. Ct. 855.

It appears that this Court never has squarely held that suppression of evidence in a state criminal prosecution violates the Fourteenth Amendment. However, it would appear that the holdings in *Mooney* v. *Holohan, Pyle* v. *Kansas,* and *White* v. *Ragen, supra,* are sufficiently broad to support such proposition. Thus, in *Pyle* v. *Kansas,* the Court held merely that knowing use by the prosecution of perjured testimony *plus* deliberate suppression amounted to a denial of due process.[1] Two United States Courts of Appeals and one federal district court have held suppression of evidence by the prosecution in a state criminal trial amounts to a denial of due process of law.[2]

The conclusion by the court below that petitioner's failure to avail himself of the statutory provisions allowing use of the previously transcribed testimony of a deceased witness forecloses his raising the point as a denial of due process in his petition for habeas corpus, blandly circumvents the allegation that the State itself, by its agent, Sheriff McCall, was responsible for the death and unavailability of this witness.

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[1] See also *United States* v. *Berger,* 295 U. S. 78, to the effect that even the prosecuting attorney must make the vital facts of the case known.

[2] *United States* v. *Rutkin,* 212 F. 2d 641; *United States* v. *Baldi,* 195 F. 2d 815, cert. den. 345 U. S. 904; *United States* v. *Ragen,* 86 F. Supp. 382.

III.

The conclusion by the Court below that no federal question is involved in the matter raised by the petition for writ of habeas corpus is probably in conflict with decisions by this Court.

The court below, in denying petitioner's application for a stay of execution pending an effort to obtain review on certiorari of its denial of the petition for habeas corpus, says: "We find no federal question involved in this controversy * * *" (Appendix, p. 17). But such a recital cannot bind this Court. *Brown* v. *Western Railway Co.*, 338 U. S. 294, 296; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 129.[1]

In *Frank* v. *Mangum*, 237 U. S. 309, this Court said, at page 332:

> Now the obligation resting upon us * * * to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petition attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it.

The proper inquiry then, it would appear, is whether the uncontroverted averments of the petition below and the other factual material before this Court demonstrate a denial of due process. To this end, even those issues which may have been previously adjudicated, or which may be procedurally foreclosed to petitioner, are entitled to consideration in an evaluation of whether, upon the whole record, there was a denial of a fair trial.

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[1] See also Robertson and Kirkham, Jurisdiction of Supreme Court of the United States, §96.

Consquently, when the court below refers to the matter as having been adjudicated on an earlier occasion, it says that when it affirms a jury's finding of guilty—even though testimony perjured by the hand of the State has been introduced at the trial and the State has suppressed evidence favorable to defendant—the proceedings are insulated by the general verdict against collateral attack.

But this Court has held otherwise. *Mooney* v. *Holohan, supra; Pyle* v. *Kansas, supra; Rochin* v. *California,* 342 U. S. 165; *Malinsky* v. *New York,* 324 U. S. 401; *Cassell* v. *Texas,* 339 U. S. 282; *Brown* v. *Allen,* 344 U. S. 443. Indeed in *Brown* v. *Allen,* this Court only recently went to great pains to examine whether the judgments under review contained fatal constitutional flaws where such questions had been raised in the proceedings which led to the convictions.

Upon this Court's *per curiam* reversal of petitioner's first conviction and sentence herein, the late Mr. Justice Jackson, concurring in the result, in an opinion in which he was joined by Mr. Justice Frankfurter, wrote:[2]

> But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.

Among the "prejudicial influences outside the courtroom", discussed in the opinion, were statements attributed to Lake County Sheriff McCall who had the prisoners in custody; the inflammatory press reports concerning the crime and the case; and the atmosphere of hostility and potential

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[2] 341 U. S. 50, 51.

violence which led the trial judge to take extraordinary precautions in preparation for and during the trial.[3]

The circumstances and events accompanying petitioner's second trial strongly indicate the presence in Marion County, contiguous to Lake County, of similar, if not stronger, "prejudicial influences" than those previously condemned.

The petition for habeas corpus alleged (Appendix, p. 6) and stands uncontroverted that the newspapers in Marion County, where petitioner's second trial was held, reported the same passion-arousing events mentioned in Mr. Justice Jackson's opinion, *supra*. In addition, the petition alleges that the local press reported, following this Court's reversal of the previous conviction, that the Sheriff of Lake County publicly said this Court had bowed "to subversive influences" (Appendix, p. 5); that the State's Attorney, several months prior to the second trial, "charged publicly that petitioner's counsel of choice represented an organization which had 'been responsible for vicious, slanderous and libelous matter filed in this Court * * *'" (Appendix, p. 5); that Sheriff McCall and one of his deputies shot and killed petitioner's co-defendant and seriously wounded petitioner, while the two were handcuffed together being transported by the Sheriff from the prison to court and, despite the wide-spread publicity given this incident and its gravity, there was no grand jury investigation and the coroner's jury found that the shootings were justifiable (Appendix, pp. 5-6); and that in another part of the State, the home of a Negro, an official of the organization identified with this case, was bombed and he and his wife were killed (Appendix, p. 6).

The public opinion survey which petitioner unsuccessfully sought to have considered as evidence upon his motion for change of venue, showed, as alleged in the petition below (Petition, 6), that "sixty-three percent of the popu-

[3] *Ibid*, pp. 51-53.

lation of Marion County either thought or were certain that petitioner was guilty and that eighty-three percent of Marion County's Negro population feared that if a member of the jury voted for acquittal, 'something would happen' to him" (Appendix, p. 6).

The introduction into evidence of the false and manufactured testimony and the suppression of evidence on the part of the State must be read in the context of the "prejudicial influences outside the courtroom" described above.

WHEREFORE, for the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Petition for a Writ of Habeas Corpus

IN THE STATE SUPREME COURT

STATE OF FLORIDA

—o—

WALTER LEE IRVIN,

Petitioner,

vs.

L. F. CHAPMAN, Superintendent of State Prison,

Respondent.

—o—

To the Honorable Chief Justice and Associate Justices:

The petition of Walter Lee Irvin respectfully shows:

I. Petitioner is a citizen of the United States and of the State of Florida.

II. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and restrained in his liberty by L. F. Chapman, Superintendent of the State Prison and is now in custody of L. F. Chapman, Superintendent, State Prison at Raiford, Florida.

III. The cause or pretext of such detention and restraint is the judgment and sentence of death pronounced upon petitioner by the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Marion County, on February 14, 1952, upon conviction of the crime of rape.

IV. Said detention and restraint is unlawful in that the judgment and sentence are illegal and void as contrary to

the Fourteenth Amendment to the Constitution of the United States forbidding any state to deprive any person of life without due process of law. The judgment and sentence are further illegal and void in that they are contrary to section 12 of the Declaration of Rights to the Florida Constitution.

V. Petitioner, a Negro, was arrested on July 16, 1949, and indicted on July 20, 1949 for the rape of Norma Padgett, a white girl. Arraigned on August 12, 1949, petitioner pleaded not guilty. Petitioner was tried before a jury from August 29 to September 3, 1949, found guilty and sentenced to death. On May 16, 1950, the Supreme Court of Florida affirmed this conviction. On writ of certiorari, the United States Supreme Court on April 9, 1951 reversed the judgment and ordered a new trial.

VI. Petitioner and co-defendant Samuel Shepherd were again indicted for rape on July 6, 1951. Arraigned on August 23, 1951, the petitioner and his co-defendant pleaded not guilty.

On October 17, 1951 petitioner and his co-defendant filed in the Circuit Court of the Fifth Judicial Circuit in and for the County of Lake an application for removal of cause, stating that they were Negroes, and that the prejudice of a great number of Lake County's citizens made them fear that a fair trial would be impossible in Lake County (TR. 20-35).*

On the same day, October 17, 1951, petitioner and his co-defendant also filed a motion to suppress certain evidence on the ground that it was obtained by an unlawful

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* The record in the case of Irvin v. Florida is referred to in the following manner: "TR." refers to the transcript of record. "R." refers to the transcript of testimony. "Ex." refers to exhibits in the above case, except that "Ex. A" and "Ex. B" refer to exhibits to this petition and are here attached.

search and seizure contrary to the Constitution of the United States and the Constitution and laws of Florida (TR. 43-46).

Before said motions could be heard, Samuel Shepherd was killed and petitioner seriously wounded on November 6, 1951, while they were being transported from the state penitentiary at Raiford to Tavares for proceedings herein. On December 3, 1951, petitioner filed an amendment to his application for removal of cause, stating that on the night of November 6, 1951, Willis V. McCall, sheriff of Lake County, murdered co-defendant Shepherd and that Sheriff McCall, aided by his deputy, Yates, seriously wounded petitioner in an attempt to murder him (TR. 100-109).

On December 6, 1951 at the suggestion of the state's attorney, the cause was removed to Marion County, Florida (TR. 118).

On February 2, 1952, petitioner filed a motion for removal of cause from the Circuit Court for the Fifth Judicial Circuit in and for Marion County, alleging that for reasons therein described, the sentiment in that County was little different from that in Lake County (TR. 208-230). Said motion reviewed the long history of violence and hostility that surrounded this case, the prejudicial public statements of state officials and the recent incident wherein Samuel Shepherd was murdered and petitioner seriously wounded by state officials.

This application was heard by the Court on February 11, 1952. At that time, defendant sought to introduce evidence of a public opinion poll concerning the opinions of Marion County citizens as to petitioner's guilt or innocence and the opinions of these citizens with respect to the possibility that violent reprisals would be taken against any member of the jury voting for acquittal. This testimony was excluded over petitioner's objection and the motion for a change of venue from Marion County was denied (R. 46-52, 55-57).

On the same day, February 11, 1952, the Court also denied petitioner's motion to suppress (R. 165).

Petitioner was tried before a jury, which returned a verdict of guilty on February 14, 1952. On the same day, the Court pronounced the sentence of death by electrocution. A motion for new trial was denied on March 11, 1952. On appeal, the Supreme Court of Florida affirmed the conviction on June 23, 1953. The United States Supreme Court then denied certiorari on January 4, 1954 and denied a petition for rehearing on February 1, 1954.

VII. Petitioner's conviction and sentence are illegal, void and in violation of the Fourteenth Amendment of the United States Constitution and Section 12 of the Declaration of Rights to the Florida Constitution for the following reasons:

A. Petitioner's trial was conducted in an atmosphere of severe hostility. The refusal of the Circuit Court for the Fifth Judicial Circuit in and for Marion County to grant petitioner's motion for a change of venue denied petitioner the possibility of a fair trial.

(1) At the time of the first trial, the entire community was infested with violence and prejudice. A mob gathered outside the county jail where petitioner and his co-defendants were incarcerated and demanded that the men be turned over to them. A mob burned down the home of defendant Shepherd's father and mother and the homes of two other Negro families. The National Guard was called out on July 17 and July 18, 1949 and on July 19, 1949 the 116th Field Artillery was summoned to Tampa as Negroes abandoned their homes and fled. The press covered these events with passion-arousing headlines. (Defendant's Ex. 2 and 3; concurring opinion of Mr. Justice Jackson, 341 U. S. at p. 50).

The newspapers also reported the apparent assertion of the Sheriff of Lake County that petitioner had con-

fessed, although no confession was ever introduced against him (Defendant's Ex. 2).

(2) This atmosphere of hostility persisted following the decision of the United States Supreme Court reversing petitioner's first conviction. Following this decision, the Sheriff of Lake County said publicly that the Supreme Court had bowed "to subversive influences." This was carried by the local press (Defendant's Ex. 11).

(3) In November, 1951, several months prior to the second trial, the State Attorney charged publicly that petitioner's counsel of choice represented an organization which had "been responsible for vicious, slanderous and libelous matter filed in this court. . . ." (TR. 124). This statement further prejudiced the atmosphere.

(4) On November 6, 1951, Sheriff McCall of Lake County shot and killed Samuel Shepherd, petitioner's co-defendant. At the same time, Sheriff McCall, aided by Deputy Sheriff Yates, shot and wounded petitioner in an attempt to kill him. Petitioner alleges and wishes to prove that both of these acts were done without justifiable cause—that he and his co-defendant, while handcuffed together and alone with the Sheriff on a dark road at night, were deliberately and without provocation shot by the Sheriff and his deputy (Ex. A here attached).

In sworn statements before a special investigator for the Governor of Florida and before the coroner's inquest, petitioner stated the above facts (TR. 104-108). Despite the gravity of the question, however, no grand jury investigation followed because petitioner and his co-defendant were so odious to the community-at-large that no one either cared or was sufficiently courageous to initiate the customary proceedings in the matter.

The coroner's inquest, which found that the shootings were justifiable, was a contrived hearing and was patently unfair. At the inquiry, one of the coroner's jurors, before

hearing any evidence, expressed the conclusion that petitioner and his co-defendant were justifiably shot (TR. 101, 113).

The finding of the coroner's inquest constituted a formal adjudication by the State that petitioner was an attempted escapee. Such an unfair adjudication seriously prejudiced public opinion against petitioner.

(5) On December 25, 1951, in another part of the State of Florida, Harry T. Moore, an official of the association which aided petitioner's defense, and his wife, were killed by the bombing of their home. This further intimidated persons who viewed petitioner's case impartially.

(6) Marion County is contiguous to Lake County and all the above events were reported in the Marion County press.

(7) The state of public opinion in Marion County at the time of petitioner's trial was such that petitioner could not receive a fair trial. A public opinion survey conducted by one of the most reputable and impartial public opinion research organizations, the Elmo Roper Agency, shows that sixty-three percent of the population of Marion County either thought or were certain that petitioner was guilty and that eighty-three percent of Marion County's Negro population feared that if a member of the jury voted for acquittal, "something would happen" to him (Ex. B here attached, pp. 22, 23, 27, 31, 35).

B. The refusal of the Circuit Court for the Fifth Judicial Circuit in and for Marion County to allow petitioner to introduce the results of the above-mentioned public opinion poll precluded petitioner from introducing substantial proof of the extent of the hostility pervading Marion County and the impossibility of petitioner's obtaining a fair trial. All of the allegations contained in paragraph VII. A above are incorporated herein.

C. Petitioner was convicted by the use of evidence obtained by an unlawful search and seizure. On July 16, 1949, Deputy Sheriff Yates appeared at petitioner's mother's home, where petitioner rented a room, and demanded of her a pair of shoes and a pair of trousers belonging to petitioner, stating that he "came for that little black nigger boy's clothes." The Deputy Sheriff had no search warrant although he had sufficient time to obtain one. Petitioner's mother, a Negro, ignorant and unlearned in matters of law, was coerced by the presence of an official and complied with the request (R. 143-153, 157).

D. Petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials.

The footprint casts made by Deputy Sheriff Yates are patently false because it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of the testimony at the trial were convex, and thus necessarily false and contrived (R. 436, 437). By knowingly using such evidence, the State deprived petitioner of a fair trial and thus denied him due process of law.

E. The totality of errors committed at petitioner's trial deprived him of a fair trial.

Petitioner incorporates herein each and every allegation made in Paragraph VII A, B, C and D.

Petitioner further alleges other seriously prejudicial errors, to wit:

(1) Various acts of prejudicial misconduct on the part of the Prosecutor denied petitioner a fair trial. In his closing agrument, the Prosecutor made invidious references (R. 510, 516) to petitioner's race when he declared, inter

alia, "... don't you know that is the colored way of thinking" (R. 516).

The Prosecutor made an erroneous, prejudicial and highly unfair assertion about defense counsel when he stated that "by a technicality he (defense counsel) stopped me from proving it" (R. 508). ... This assertion was considered by the Supreme Court of Florida to be erroneous and the refusal of the trial court to instruct the jury to disregard this remark was likewise considered error by that court.

The Prosecutor seriously prejudiced petitioner when he asserted his personal belief in petitioner's guilt and when he referred to his ill health in order to evoke sympathy (R. 505-506, 518).

In view of the hostile atmosphere which had long surrounded this case and in view of the allegations contained in Paragraph VII A of this petition, the Prosecutor seriously prejudiced petitioner by referring in his closing statement to the help obtained by petitioner from outside the state and by asserting that "... any negro can get a fair trial in Marion County, if the outside world would just leave us alone ..." (R. 504).

(2) The State engaged in a constructive suppression of evidence by refusing to obtain accurate scientific analysis of the raw physical evidence which was found. Such scientific analysis was available to local law enforcement officials.

The state introduced into evidence petitioner's trousers containing a smear thereon (State Ex. 3, R. 356-357). The implication of this evidence was that the smear was a semen stain. The State refused, however, to secure available scientific analysis in order to determine accurately whether the stain was in fact semen.

The state introduced into evidence "lint" found near the scene of the alleged crime. There was testimony that

this "lint" was similar to that found in co-defendant's Shepherd automobile. The State, however, failed to secure accurate scientific anaylsis necessary to make a true comparison (State's Ex. 2, R. 354-356).

Plaster casts of tire tracks were made by Deputy Sheriff Yates.

The State failed here again to secure an accurate scientific analysis which would take into consideration such highly pertinent factors as evidence of wear, air bells, wear by gravel or stone, etc. (R. 431, 352-353, 365-366).

By refusing to obtain accurate scientific analysis of the raw physical evidence and by introducing third grade evidence of practically no probative value but full of prejudicial innuendoes, the State denied petitioner a fair trial and thus denied him due process of law.

VIII. The cumulative effect of each of the violations of petitioner's fundamental rights as set forth in Paragraph VII rendered petitioner's trial a mask for the denial of his constitutional rights guaranteed in the Fourteenth Amendment to the United States Constitution and Section 12 of the Declaration of Rights to the Florida Constitution.

IX. Sheriff McCall's deliberate killing of Samuel Shepherd resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of petitioner herein and which would have proved petitioner's innocence of the crime which he was charged.

X. The State engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined Norma Padgett early the same morning the alleged rape was supposed to have occurred, and your petitioner based upon information and belief, believes that

the State suppressed the testimony of the medical doctor because the said medical doctor would have testified that Norma Padgett had not been raped.

WHEREFORE, petitioner prays that a writ of habeas corpus issued herein directed to the said L. F. Chapman, Superintendent of the State Prison, commanding him to produce the body of the petitioner Walter Lee Irvin before this court at a time and place to be specified in said writ, to the end that this court may inquire into the cause of the petitioner's detention, and that the petitioner be ordered discharged from the detention and restraint aforesaid.

Dated this 3rd day of November, 1954.

WALTER LEE IRVIN,
Petitioner.

PAUL C. PERKINS, Esq.,
647 West South Street,
Orlando, Florida,

THURGOOD MARSHALL, JACK GREENBERG,
107 West 43rd Street,
New York, New York,

Attorneys for Petitioner.

STATE OF FLORIDA }
COUNTY OF ORANGE } ss.:

WALTER LEE IRVIN, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof; and that the same is true to his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters he believes them to be true.

WALTER LEE IRVIN.

Subscribed and sworn to before me
this 3rd day of November, 1954.

.....
Notary Public, State of Florida at Large.

Notary Public, State of Florida at large
My commission expires Jan. 6, 1957.
Bonded by American Surety Co. of N. Y.

(SEAL)

Exhibit A

STATE OF FLORIDA
COUNTY OF ORANGE

I, WALTER LEE IRVIN, being duly sworn, deposes and says:

That on November 6, 1951, after dark, Sheriff McCall and Deputy Sheriff Yates came to Raiford to pick up Samuel Shepherd and me. We got into the sheriff's car. At Wiersdale, Deputy Sheriff Yates got into another car, but Shepherd and myself stayed in the sheriff's car. We were handcuffed together in the front seat. Shepherd was on the outside and I was in the middle.

Before we got started again the deputy went to see whether the car would start. He cranked it and it started. At Wiersdale, where there is a school, there is a clay road that turns off the highway. The deputy sheriff turned off onto that road and the sheriff followed. We went on that road a short distance; I do not know how far. The sheriff and the deputy were talking on the radio.

The deputy sheriff turned off to the right. I do not know where he went. We turned off to the right and went on down the road apiece until the sheriff began to shimmy his wheels. The sheriff pulled off to the side and stopped, stating that, "something is wrong with my left front tire." He got a flashlight with a red band from under the seat on the floor board, got out of the car and checked the tires. He then came back into the car and said that he could not find anything wrong. He drove about two more miles and then stopped again. The wheels started shimmying again. The sheriff got out of the car again with his flashlight, kicked the right front wheel and then came around to where Shepherd was sitting on the righthand side of the car. The sheriff then said, "You SOB's get out and get this tire fixed." I did not see any tires in the back, but we had to

obey because he was the sheriff. We then went to get out. The sheriff then fired right quick at Shepherd and then he fired at me hitting me in my chest. He then grabbed me by the clothes and threw me to the ground. He also threw Shepherd to the ground. I did not say anything. He then shot me again in the shoulder, but I still did not say anything.

I then heard him say, "I got rid of them, killed the SOB's." The sheriff then ran around to the car and called the deputy sheriff on the radio. I heard him say to the deputy, "Pull around here right quick, these SOB's tried to jump me and I did a good job."

The deputy sheriff soon came, pulled his car over to where the sheriff's car was parked and got out of the car. The deputy shined a light into my face and said to the sheriff, "That SOB is not dead; let's kill him." The deputy then pointed a pistol at me and pulled the trigger but the gun did not shoot. The deputy then took the pistol around to the car lights and looked at it. He then returned and fired at me. The bullet hit me in the neck and I began to bleed out of my nose. I still did not say anything; I did not let them know I was not dead.

I did not try to jump the sheriff. I did not try to escape that night.

(Signed) WALTER LEE IRVIN
Walter Lee Irvin

Subscribed and sworn to me this 3rd day of November, 1954, at Raiford, Florida.

PAUL C. PERKINS
Notary Public, State of Florida at large
My commission expires Jan. 6, 1958
Bonded by American Surety Co. of N. Y.

Opinion of Sebring, *J.*

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1954

EN BANC.

Case No. 25,436

WALTER LEE IRVIN,

Petitioner,

vs.

L. F. CHAPMAN, Superintendent of State Prison,

Respondent.

Opinion filed November 5, 1954.

A Case of Original Jurisdiction—Habeas Corpus.

PAUL C. PERKINS, THURGOOD MARSHALL and JACK GREENBERG, for Petitioner.

RICHARD W. ERVIN, Attorney General and REEVES BOWEN, Assistant Attorney General, for Respondent.

SEBRING, *J.*

By this habeas corpus proceeding the petitioner attempts to question the legality of the judgment and sentence heretofore entered in this cause. From a study of the petition it appears that, with the exception of the matters hereinafter noted, the petitioner has alleged no facts in his peti-

tion that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause. See Irvin v. State (Fla.), 66 So. 2d 288, certiorari denied 346 U. S. 927, 98 L. Ed. 205, 74 S. Ct. 316, reh. den. 347 U. S. 914, 98 L. Ed. 353, 74 S. Ct. 479. Therefore, such matter is not now open for adjudication.

As to new matter which it is suggested by the petitioner should be sufficient to require that the judgment and sentence be set aside and a new trial awarded, the petitioner avers in his petition that subsequent to the first trial of the original cause—Shepherd et al. v. State (Fla.), 46 So. 2d 880, reversed by Supreme Court of United States, 341 U. S. 50, 95 L. Ed. 740, 71 St. Ct. 549, and remanded for new trial, 52 So. 2d 903—the sheriff of the county in which the crime is alleged to have occurred shot and killed one Samuel Shepherd, a codefendant in the case, which "resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of petitioner herein and which could have proved petitioner's innocence of the crime for which he was charged."

As to this point, the records of this Court, of which we take judicial notice, show that at the first trial of this cause the codefendant Shepherd was sworn and testified in full detail as to the activities in which he and the petitioner were engaged. Section 920.09, Florida Statutes 1951, provides that when a new trial is granted in a criminal case such new trial shall proceed in all respects as if no former trial had been had; except that if witnesses used on the first trial are dead at the time of the second trial "the evidence of such witnesses on former trial may be presented as the same was taken by the court reporter."

The records of this Court show also that on the second trial of this cause in the court below, no effort was ever made by the petitioner to introduce into evidence a transcribed copy of the evidence given at the former trial by the decedent Shepherd. Having failed to introduce this

evidence at the second trial, the petitioner is foreclosed from now raising the question as to what testimony Shepherd might have given at the second trial had he lived and elected to take the stand and give testimony in behalf of the petitioner. State ex rel. Johnson v. Mayo (Fla.), 69 So. 2d 307, certiorari denied 347 U. S. 992, 98 L. Ed. 722, 74 S. Ct. 855.

The only other new matter that petitioner has attempted to inject into his petition as the basis for a new trial is the averment in the petition that upon the second trial of the cause in the court below "The State engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined the [victim of the alleged rape] early the same morning the alleged rape was supposed to have occurred, and your petitioner based upon information and belief, believes that the state suppressed the testimony of the medical doctor because the said medical doctor would have testified that [the victim of the alleged rape] had not been raped."

It takes nothing more than a casual inspection of this allegation to disclose that it does not constitute a sufficient predicate for the issuance of the writ. It is not shown, for example, that the petitioner did not know that the medical doctor had examined the victim of the rape. It is not shown that any effort was ever made by the petitioner to call the doctor as a witness to testify in his behalf. It is not shown that the medical doctor would have given testimony favorable to the petitioner had he been called to testify. All that is shown by the petition in this regard is that the petitioner *believes* that if the doctor had been called he might have given testimony favorable to his cause. Therefore, in the light of the tacit admissions in the allegations of the petition, it is entirely immaterial that the state did not call the medical doctor as a witness, because the defendant, petitioner in this proceeding, was free to do so.

Furthermore, while from aught that appears in the petition to the contrary, the petitioner might have known at the time of the second trial that the medical doctor had examined the victim of the rape, the petitioner has not made any attempt in his petition to give a reason for his failure to raise on the prior appeal the ground now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof. State ex rel. Johnson v. Mayo, supra. Habeas corpus may not be used as a vehicle to raise for the first time questions that the petitioner had a fair and adequate opportunity to raise, and could and should have raised, during the formal trial of the cause.

At the bar of this Court counsel for the petitioner has requested the Court, in the event it denies the petition, to grant a stay of sentence to enable the petitioner to seek a review of our order by certiorari. We find no federal question involved in this controversy, and consequently the application for stay should be denied.

Accordingly, it is ordered that the petition for the writ of habeas corpus, and the application for a stay order, be and the same are hereby severally denied.

ROBERTS, *C. J.*, TERRELL, THOMAS, HOBSON, MATHEWS and DREW, *JJ.*, CONCUR.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. MCCORD, Clerk of the Supreme Court of Florida, do hereby certify that the foregoing and attached four pages constitute a true and correct copy of the opinion and judgment of said Court filed in said Court on November 5th, 1954, in that certain cause recently pending in said Court wherein Walter Lee Irvin was Petitioner, and L. F. Chapman, Superintendent of State Prison, was Respondent, all as the same appears among the records and files of my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Tallahassee, the capital, on this the 10th day of November, 1954.

GUYTE P. MCCORD,
Clerk of the Supreme Court
of Florida.

(SEAL)